

STATE OF MICHIGAN
COURT OF APPEALS

JAMIE BUSH,

Plaintiff-Appellant,

v

PENINSULAR REALTY, INC.,

Defendant-Appellee.

UNPUBLISHED

December 13, 2011

No. 298617

Genesee Circuit Court

LC No. 09-091246-NZ

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this retaliatory discharge action. Because plaintiff failed to establish that she engaged in a protected activity under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, failed to demonstrate a causal connection between her receipt of medical treatment and her discharge, and failed to show that defendant's legitimate, nonretaliatory reason for discharging her was merely pretextual, we affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Although defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), because the trial court relied on matters outside the pleadings when it granted the motion, we will review the court's decision under subrule (C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). In reviewing a motion pursuant to MCR 2.116(C)(10), we review the affidavits, depositions, admissions and other documentary evidence in a light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Latham*, 480 Mich at 111. We will consider only the evidence that was properly submitted to the trial court before its decision. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). A genuine issue of material fact exists "when reasonable minds could differ on an

issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).¹

The WDCA requires employers to provide compensation to employees for work-related injuries regardless of fault. *Pro-Staffers, Inc v Premier Mfg Support Servs, Inc*, 252 Mich App 318, 323; 651 NW2d 811 (2002). Under MCL 418.301(11) of the WDCA, an employer may not:

discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under [the WDCA] or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by [the WDCA]. [See also *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999).]

To establish a retaliatory discharge claim, the plaintiff has the burden of proving that: (1) she asserted her right to worker’s compensation benefits; (2) she suffered an adverse employment action, i.e., she was discharged; (3) the defendant’s stated reason for the adverse employment action was a pretext; and, (4) the defendant’s true reason was in retaliation for the plaintiff filing a worker’s compensation claim. *Id.* at 470.

Here, defendant argues that plaintiff did not engage in a protected activity under the WDCA because she did not file her worker’s compensation claim until after she was discharged. This Court has held that a plaintiff cannot establish a retaliatory discharge claim based on the anticipated filing of a worker’s compensation claim. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 668; 473 NW2d 790 (1991). The record shows that plaintiff did not assert her rights to worker’s compensation benefits before her discharge as the Woodhaven Senior Community activities director. Plaintiff did not request or file a worker’s compensation claim. Rather, after her termination, Kellie Liscum, the comptroller/human resource manager at Woodhaven Senior Community, independently filed a worker’s compensation claim on plaintiff’s behalf. Notwithstanding that she did not file a claim, plaintiff argues that she asserted her rights under the WDCA by seeking medical care and treatment before her discharge. The record shows that plaintiff sought medical care after her injury, but plaintiff’s deposition testimony does not indicate that she sought such care in conjunction with her rights under the WDCA. Not until she filed her affidavit after her deposition did plaintiff assert that she sought medical attention pursuant to the WDCA. A witness is bound by her deposition testimony, which cannot be contradicted in an affidavit in an attempt to defeat a motion for summary disposition. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). Thus, the trial court

¹ In her brief on appeal, plaintiff relies in part on outdated and overruled summary disposition standards. No longer must a court deny a motion for summary disposition unless it is “impossible” for the nonmoving party to support its claim at trial. Nor may a trial court deny summary disposition on the basis that a record “might be developed” that could cause reasonable minds to differ. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999); *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

properly determined that plaintiff failed to establish a prima facie retaliatory discharge claim because she failed to show that she engaged in a protected activity under the WDCA by seeking worker's compensation benefits.

In any event, even if plaintiff's receipt of medical treatment constituted a protected activity under the WDCA, she failed to establish a genuine issue of material fact regarding whether her termination was causally connected to her medical treatment and whether defendant's stated reason for her discharge was pretextual. The burden is on the plaintiff to show a causal connection between the protected activity and the adverse employment action. *Chiles*, 238 Mich App at 470. Once the plaintiff establishes a causal link, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for the adverse employment action. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 134-135; 666 NW2d 186 (2003). If the defendant produces evidence supporting such a reason, the burden then shifts back to the plaintiff to show that the defendant's reason is not the true reason, but a mere pretext for retaliation. *Id.* at 134; see also *Chiles*, 238 Mich App at 470. We conclude that plaintiff failed to establish a causal connection between her termination and receipt of medical treatment and failed to demonstrate that defendant's legitimate, nonretaliatory reason for terminating her employment was pretextual.

To establish a causal connection, plaintiff relies only on the temporal link between the medical treatment and her discharge and her subjective belief that her supervisor's mood changed after her injury. Plaintiff failed to present any evidence to establish a causal connection and "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). Moreover, the record shows that defendant's employees, including David Dixner, plaintiff's supervisor, repeatedly encouraged and suggested that plaintiff seek medical treatment for her injury. Plaintiff herself decided to wait to seek treatment because she wished to speak with Dixner regarding the protocol in such situations. Thus, plaintiff failed to present any evidence of a causal connection between her receipt of medical treatment and her discharge.

Further, plaintiff failed to show that defendant's legitimate, nonretaliatory reason for discharging her was merely pretextual. Dixner maintained that he discharged plaintiff because "[s]he failed to meet [his] expectations regarding aspects of the activities director position which were important to success in the job, including marketing the events to the senior residents, keeping them informed, and having good communication and interaction with them." Plaintiff had just completed a 90-day orientation period, and Dixner received complaints regarding plaintiff's performance. Plaintiff's coworkers also had concerns about plaintiff's interaction and comfort level with the residents. Moreover, plaintiff received a minor infraction for failing to follow procedure regarding lunch breaks, clocking in early, and arriving late for a scheduled shift. Thus, we conclude that defendant provided a legitimate, nonretaliatory reason for discharging plaintiff, and plaintiff failed to provide any evidence beyond her subjective belief that defendant's reason was a mere pretext for retaliation. Accordingly, she failed to establish a genuine issue of material fact for trial, and the trial court properly granted defendant's motion for

summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio